

DECISIONS AND ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

In the Matter of JOSEPH S. FINCH & Co., INC. and UNITED DISTILLERY
WORKERS UNION, LOCAL NO. 3

In the Matter of JOSEPH S. FINCH & Co., INC. and INTERNATIONAL
BROTHERHOOD OF FIREMEN & OILERS, LOCAL NO. 77

Cases Nos. R-394 and R-395.—Decided May 2, 1938

Liquor Distilling Industry—Investigation of Representatives: controversy concerning representation of employees: controversy concerning appropriate unit; employer's refusal to grant recognition of union; rival organizations—*Closed-Shop Contract:* dependent, by its terms, upon Board's decision as to inclusion of certain categories of employees—*Unit Appropriate for Collective Bargaining:* where other considerations determinative of appropriate unit are evenly balanced, decisive factor is the desire and choice of employees involved; determination of, dependent upon election results; occupational differences; history of collective bargaining relations with employer—*Elections Ordered*

Mr. Robert H. Kleeb, for the Board.

Mr. Frederic P. Lee, of Washington, D. C., for the Company.

Mr. Benjamin C. Sigal, of Pittsburgh, Pa., for the United.

Mr. Leo S. Shapiro, of Pittsburgh, Pa., for the Brotherhood and the Council.

Miss Margaret B. Bennett, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTION

STATEMENT OF THE CASE

On June 8, 1937, United Distillery Workers Union, Local No. 3, herein called the United, executed and subsequently filed with the Regional Director for the Sixth Region (Pittsburgh, Pennsylvania) a petition alleging that a question affecting commerce had arisen concerning the representation of employees of Joseph S. Finch & Co., Inc., Schenley, Pennsylvania, herein called the Company, and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On July 19, 1937, International Brotherhood of Firemen & Oilers, Local No. 77, herein called the Brotherhood, filed a similar petition. On August 26, 1937, the National

Labor Relations Board, herein called the Board, acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for appropriate hearings upon due notice, and acting pursuant to Article III, Section 10 (c) (2), of said Rules and Regulations, further ordered that the cases be consolidated for purposes of hearing.

On September 4, 1937, the Regional Director issued a notice of hearing, copies of which were duly served upon the Company, the United, the Brotherhood, the Committee for Industrial Organization, herein called the C. I. O., and the American Federation of Labor, herein called the A. F. of L. Pursuant to the notice, a hearing was held on September 13 and 14, 1937, at Pittsburgh, Pennsylvania, before Alvin J. Rockwell, the Trial Examiner duly designated by the Board. At the hearing, a motion was made and granted to amend the original petition of the United so as to designate all the production and maintenance employees of the Company, except watchmen, office workers, and persons employed in supervisory positions, as the bargaining unit alleged to be appropriate. Upon motion at the hearing, Carpenters' District Council of Pittsburgh and Vicinity of United Brotherhood of Carpenters and Joiners of America, herein called the Council, was permitted to intervene and to file a petition requesting an investigation and certification of representatives pursuant to Section 9 (c) of the Act. The Board, the Company, the United, the Brotherhood, and the Council were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. During the course of the hearing the Trial Examiner made several rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Joseph S. Finch & Co., Inc., whose plant is at Schenley, Pennsylvania, produces whiskey and gin, and distillers' dried grains as a byproduct. Whiskey is the principal product. In 1936 gross sales amounted to approximately \$6,112,000 and annual pay roll to about \$1,435,000.

Over 80 per cent of the whiskey produced by the Company is shipped to States other than Pennsylvania and to foreign countries, and most of the materials and supplies used by the Company come from outside of Pennsylvania.

II. THE ORGANIZATIONS INVOLVED

United Distillery Workers Union, Local No. 3, is a labor organization affiliated with the Committee for Industrial Organization, admitting to its membership all production and maintenance employees of the Company, excluding office workers, watchmen, supervisory employees, and other direct representatives of the management.

International Brotherhood of Firemen & Oilers, Local No. 77, is a labor organization affiliated with the American Federation of Labor. It admits to its membership all firemen and water tenders employed by the Company.

Carpenters' District Council of Pittsburgh and Vicinity of United Brotherhood of Carpenters and Joiners of America is a labor organization affiliated with the American Federation of Labor, representing all the local unions of United Brotherhood of Carpenters and Joiners of America in Pittsburgh and vicinity. All carpenters employed by the Company are eligible for membership in one of the local unions subject to the jurisdiction of the Council.

III. THE QUESTION CONCERNING REPRESENTATION

It is undisputed that the United represents a majority of the production and maintenance employees of the Company. But the Brotherhood asserts that it represents a majority of the firemen and water tenders and the Council contends that it represents all of the carpenters. Each union requested the Company to contract with it, but until July 1937, the Company failed to act with respect to any of these requests. On July 20, 1937, the Company and the United executed a closed-shop contract covering all of the employees of the Company, except office workers, watchmen, supervisory employees, and other direct representatives of the management, subject to any decision of the Board concerning firemen and water tenders. It purported to supersede a contract, effective as of July 15, 1936, entered into between the Company and Distillery Workers Union No. 19983, affiliated with the A. F. of L., Local Lodge No. 620 of the International Association of Machinists, affiliated with the A. F. of L., the Brotherhood, and the A. F. of L. The 1936 contract was for a period of 1-year, and thereafter unless altered after 30 days' notice in writing by any party. Before the expiration of the 1-year period, the United, to which an overwhelming majority of the employees of the Company then belonged, filed its petition with the Board.

Subsequently the Brotherhood also petitioned the Board for an investigation and certification of representatives. Under these circumstances, it cannot be contended that the Board is precluded by the contract from determining and certifying representatives.

We find that a question has arisen concerning representation of employees of the Company.

IV. THE EFFECT OF THE QUESTION CONCERNING REPRESENTATION UPON COMMERCE

We find that the question concerning representation which has arisen, occurring in connection with the operations of the Company described in Section I above, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE APPROPRIATE UNIT

The Company has a plant pay roll of approximately 1,037 employees, in classifications indicating a high degree of division of labor. Of these employees, about 28 are firemen or water tenders and 5 are carpenters. The firemen and water tenders work in the two powerhouses, which are located about a quarter of a mile apart at the two ends of the plant and which are essential to its operation. The carpenters do general maintenance work. The firemen, the water tenders, and the carpenters are all skilled workers and receive relatively high rates of pay.

The United claims that all of the production and maintenance employees, except watchmen, office workers and supervisory employees, constitute a single unit appropriate for purposes of collective bargaining. The Brotherhood contends that the firemen and water tenders should be considered a separate unit. The Council asserts that the five carpenters constitute a single appropriate unit. None of the other craft groups seek to be excluded from the industrial unit urged by the United.

The Brotherhood claims that the firemen and water tenders constitute a separate unit appropriate for purposes of collective bargaining because they perform skilled work different in character from that done by other employees; because they work in four 6-hour shifts instead of in the generally prevailing three 8-hour shifts; because they work in the two powerhouses, which are physically separated from the rest of the plant; and because a majority of them desire craft representation.

The Council claims that the special skill required of carpenters makes craft representation preferable for them, and that all the carpenters prefer such representation.

It is undisputed that the A. F. of L. represented the respondent's employees for purposes of collective bargaining until the spring of 1937. In January or February 1936, a committee of Distillery Workers Union No. 19983, the first labor organization established among the employees of the Company, began negotiating with the Company for a contract covering all production and maintenance workers paid on an hourly basis. Distillery Workers Union No. 19983 was an A. F. of L. federal union, admitting to its membership all hourly and some salaried employees. While negotiations were pending, all firemen and water tenders employed by the Company who were members of Distillery Workers Union No. 19983 were transferred to the Brotherhood. About this time, also, the machinists were transferred to the International Association of Machinists. These transfers were made in accordance with the policy of the A. F. of L. of withdrawing craft groups from federal unions as soon as the formation of craft locals appears to be practicable. The bargaining undertaken by Distillery Workers Union No. 19983 resulted in the contract, effective as of June 15, 1936, referred to above, which governed general working conditions and was signed by Distillery Workers Union No. 19983, by Local Lodge No. 620 of the International Association of Machinists, by the Brotherhood, and by the A. F. of L. through David Williams, general organizer.

No further efforts toward collective bargaining on behalf of the employees of the Company are shown by the record until June 1937, except that some grievances were settled by the Brotherhood.

About the first week in June 1937 the Council, claiming to represent the carpenters, orally requested the Company to enter into a contract making certain wage increases obtained by carpenters elsewhere in the Pittsburgh district applicable to carpenters employed by the Company. About a week later, the Brotherhood orally requested the Company to confer with it concerning a contract for the firemen and water tenders. Those negotiations were dropped when the Company replied that it understood it was required to deal with representatives of the majority of the employees.

On July 20, 1937, the United, as indicated in Section III above, obtained a closed-shop contract with the Company, covering, subject to any order the Board might issue concerning the bargaining agency entitled to represent the firemen and water tenders, all production and maintenance employees, except office workers, watchmen, supervisory employees, and other direct representatives of the management.

In view of the facts stated above, it appears that the Company's production and maintenance employees can be considered either as a single unit appropriate for purposes of collective bargaining, as claimed by the United, or as three such units, as claimed by the Brotherhood and the Council. In such a case, where the considera-

tions are so evenly balanced, we hold that the determining factor is the desire of the employees themselves.

The Brotherhood introduced into evidence three papers, dated June 12, August 25, and September 13, 1937, respectively, signed by firemen and water tenders employed by the Company and designating the Brotherhood their representative for purposes of collective bargaining. A majority of the firemen and water tenders signed one or the other of these papers. But there is some evidence of fluctuation of allegiance on their part between the Brotherhood and the United; and the United challenges the Brotherhood's authority now to represent a majority of the firemen and water tenders, although the United itself claims only 11 firemen and water tenders as members. In addition, there is some evidence to the effect that not all the firemen and water tenders who signed the last paper circulated by the Brotherhood realized exactly what they were signing.

During the hearing, on September 13, 1937, the Council obtained the signatures of all of the carpenters to a paper authorizing the Council to act as their collective bargaining representative. Two of the carpenters who signed this paper had previously joined the United.

We feel that on the basis of the record there is some doubt as to the wishes of the firemen and water tenders and the carpenters respecting representation. We will, therefore, order an election among the firemen and water tenders on the one hand and the carpenters on the other to determine whether the firemen and water tenders wish to be represented by the Brotherhood or the United, or by neither, and whether the carpenters wish to be represented by the Council or the United, or by neither. If a majority of the firemen and water tenders select the Brotherhood, the firemen and water tenders will be constituted a separate unit. If the United is accorded a majority, the firemen and water tenders will be included in the unit embracing all the production and maintenance employees of the Company, excluding watchmen, office workers, supervisory employees, and other direct representatives of the management, and excluding the carpenters, if they elect to bargain as a separate unit. If a majority of the carpenters select the Council as their representative for purposes of collective bargaining, the carpenters will be constituted a separate unit. If a majority favor the United, the carpenters will be included in the unit embracing all the production and maintenance employees, excluding watchmen, office workers, supervisory employees, and other direct representatives of the management, and excluding firemen and water tenders, if the firemen and water tenders elect to bargain separately.

The firemen and water tenders and the carpenters eligible to vote in the said elections shall be those employed by the Company during

the pay-roll period next preceding the date of the issuance of this Decision and Direction of Election.

The United offered to introduce into evidence membership cards showing that it represented an overwhelming majority of the production and maintenance employees of the Company, excluding watchmen, office workers, and supervisory employees. Since the parties at the hearing did not dispute that the United represented this majority, the Trial Examiner stated that it would not be necessary to put the cards in evidence. A division of the firemen and water tenders on the one hand and the carpenters on the other into separate units would not disturb this majority. We will not, therefore, direct an election among the production and maintenance employees, exclusive of watchmen, office workers, supervisory employees and other employees directly representing the management, but after the elections have been conducted among the firemen and water tenders and the carpenters, we will certify the United as the representative for purposes of collective bargaining of all production and maintenance employees, except watchmen, office workers, and supervisory employees, and other direct representatives of the management, including or excluding the firemen, water tenders, and carpenters, according to the results of the elections.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

CONCLUSION OF LAW

A question affecting commerce has arisen concerning the representation of employees of Joseph S. Finch & Co., Inc., Schenley, Pennsylvania, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

DIRECTED that, as part of the investigation authorized by the Board to ascertain representatives for collective bargaining with Joseph S. Finch & Company, Inc., Schenley, Pennsylvania, an election by secret ballot shall be conducted within fifteen (15) days from the date of this Direction, under the direction and supervision of the Regional Director for the Sixth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among firemen and water

tenders on the one hand and among carpenters on the other, who were employed by Joseph S. Finch & Company, Inc., at any time during the pay-roll period next preceding the date of the issuance of this Decision and Direction of Election, excluding employees who left the employ of the Company or were discharged for cause between such date and the date of election, to determine whether the firemen and water tenders wish to be represented by International Brotherhood of Firemen & Oilers, Local No. 77, or by United Distillery Workers Union, Local No. 3, for the purposes of collective bargaining, or by neither, and whether the carpenters wish to be represented by United Brotherhood of Carpenters and Joiners of America or by United Distillery Workers Union, Local No. 3, for the purposes of collective bargaining, or by neither.

MR. EDWIN S. SMITH, dissenting:

The history of collective bargaining in the Company, as well as the character of the Company's operations, point to the propriety of a determination that those employees claimed by the United, the industrial union, constitute the appropriate bargaining unit.¹ The contract signed by the A. F. of L. unions with the Company in 1936 was the result of bargaining on an industrial basis. This fact is not invalidated by the circumstance that after the Federal Union was formed two craft unions affiliated with the A. F. of L. successfully claimed jurisdiction over certain employee groups in the plant. The record shows that after these transfers of membership to the craft unions had been accomplished, the negotiating committee representing the Federal Union was not enlarged specifically to cover separate representation for the membership of the International Association of Machinists or the Brotherhood. That the two craft organizations signed the contract so negotiated merely sets their stamp of approval on the terms of a contract which was executed in favor of all the employees including their own members.

The subsequent efforts of the Council and the Brotherhood to establish separate collective bargaining for the crafts which they sought to represent are not sufficient in themselves to raise a doubt as to the appropriateness of the more inclusive unit.

I would dismiss the petitions of the Council and the Brotherhood and certify the United as the exclusive representative for those employees which it claims constitute the appropriate unit.

¹ See my dissent in *Matter of Allis-Chalmers Manufacturing Company and International Union, United Automobile Workers of America, Local 248*, 4 N. L. R. B. 159, and similar cases.